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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1091.

C. W. FALWELL, JR., and FALWELL FAST FREIGHT, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees.*

BRIEF AMICI CURIAE OF BRADY TRANSFER AND STORAGE COMPANY AND THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS IN REPLY TO THE MOTION TO AFFIRM.

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OPINION OF THE LOWER COURT.

The opinion of the United States District Court for the Western District of Virginia is reported in 60 F. Supp. 71.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court arises under Sec. 228 of the Judicial Code, 28 U. S. C. A. 345. Appeal was allowed on February 1, 1947, appeal papers were served on February 11, 1947, and the original record was certified to this Court and received by the clerk on March 3, 1947.

This is a direct appeal from a final decree, dated December 21, 1946, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission, decided January 14, 1946, and reported at 40 M. C. C. 439.

The Commission's order was issued in a proceeding arising under Section 5 of the Interstate Commerce Act, as amended (49 U. S. C. A. 5). The order denied appellants' application to purchase a portion of the operating authority of W. B. Draper, concluding that the purchase would not be consistent with the public interest for reasons stated in the report.

A motion to affirm the decree of the lower court was filed by appellees on March 4, 1947, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States. This brief *amici curiae* is filed in reply to said motion, pursuant to agreement by all parties.

QUESTIONS PRESENTED.

The instant case appears to involve two fundamental questions not heretofore passed upon by this Court:

1. Does the Commission have the power in granting certificates, or thereafter to limit the quantity and characteristics of service which a common carrier of property by motor vehicle may render, provided the service is conducted within the territorial and commodity limitations of the carrier's operation?

2. If the Commission does have such power, is it exercised by the use of the term "over irregular routes" in the grant of certificates so that a carrier with a certificate so phrased may not legally operate between his authorized termini, or within his authorized area, in a manner similar to that in which a carrier granted authority to operate over regular routes between the same points would operate?

These questions are raised by the Assignment of Error described in the Motion to Affirm (p. 4) as follows:

> "2. That the order made by the full Commission on January 14, 1946, upon reconsideration of the prior order of Division 4 is invalid because based on an erroneous conception of the kind of service that an irregular-route carrier may render."

STATEMENT OF INTEREST IN THE PROCEEDING.

The Brady Transfer & Storage Company and the many hundred members of the Irregular Route Common Carrier Conference of the American Trucking Associations have a vital interest in the questions presented. They hold certificates authorizing operations "over irregular routes" and have built up transportation businesses which yield them revenues amounting to many millions of dollars annually from services over such routes. If the first question presented were to be answered in the negative, and the second in the affirmative as the lower court did answer them, their businesses would be destroyed.

That is exemplified by a recent decision of Division 5 of the Commission in a proceeding known as "*Transportation Activities of the Brady Transfer and Storage Company*, No. MC-C-246." That proceeding was instituted by the Commission on its own motion to determine whether certain of Brady's operations conducted pursuant to a certificate authorizing operations "over irregular routes" constituted unauthorized "regular-route scheduled interstate motor carrier transportation service." Brady is the respondent in that proceeding, and the Conference intervened in his behalf. In its decision, the Commission directed Brady to cease and desist from the performance of certain irregular-route operations within the territorial limits of the Brady certificate upon a finding that Brady conducted such operations in a manner similar to regular-route operations, and consequently illegally. In the Brady case, Division 5 held in essence that irregular-route carriers are not authorized to conduct a service which reflects the following character-

istics: a predetermined plan which amounts to a recurrent geographical pattern of operation; traffic consisting predominantly of aggregated less-than-truckload shipments received from many different shippers; intensive solicitation of such traffic; use of terminals and call stations at points other than the carrier's base; regular use of the same highways; regular operation between the same points; a known, generally accepted or held out periodicity of service whether daily or more or less frequent; schedules, that is, a pattern of departures and arrivals, particularly if advertised to shippers.

These criteria are stated to be incidents of regular-route service and not authorized for use by irregular route certificate holders. In essence, the views expressed by Division 5 are these: a carrier authorized to perform service over irregular routes must confine his business to a few shippers, shipping largely in truckloads or in large shipments rather than small ones; he must not hold himself out to the public generally or to perform any standard, recurrent pattern of service; he must not let his operation develop into scheduled service but must keep it sporadic and uncertain; he must limit the quantity and the quality of the transportation service he offers; he must serve certain selected shippers and refuse to serve the public generally.

In imposing these requirements in the Brady case, Division 5 proceeded upon the assumption that the questions above stated should be answered in the affirmative. In arriving at that conclusion, Division 5 relied upon the holding of the lower court in the instant case. If the theory of the Commission and the lower court in the instant case is sustained, the growth of operations over irregular routes will be retarded and every irregular-route operation of substantial size will be threatened with destruction.

POINTS OF LAW RELIED UPON.

The points of law relied upon to sustain Assignment of Error No. 2 are as follows:

1. In determining whether a proposed transaction subject to the provisions of Sec. 5 of the Interstate Commerce Act (49 U. S. C. A. 5) is "consistent with the public interest", the Commission must make essential findings of fact to support its ultimate conclusion of law.

2. An order of the Interstate Commerce Commission concluding that a proposed transaction subject to the provisions of Sec. 5 of the Act (49 U. S. C. A. 5) would not be consistent with the public interest, which conclusion is supported only by findings of fact based upon an error of law, is erroneous.

3. It is error for the Commission to find that it has statutory authority to restrict the quantity or quality of the service which may be performed by a common carrier of property by motor vehicle, issued a certificate of public convenience and necessity pursuant to Sec. 206(a) (49 U. S. C. A. 306(a)) of the Act, within the territorial and commodity limits of such certificate.

4. It is an error for the Commission to find that in issuing a certificate of public convenience and necessity to a common carrier of property by motor vehicle pursuant to Sec. 206(a) (49 U. S. C. A. 306(a)) of the Act which authorized operations "over irregular routes" the recipient was thereby restricted from performing whatever quantity and quality of service his facilities and the needs of the public would permit within the territorial and commodity limitations in such certificate.

5. The Commission's finding that the quality and quantity of the service propose to be rendered by Falwell over the operating authority of Draper would constitute an unlawful use by Falwell of such authority is erroneous as a matter of law, and if the conclusion of the Commission

that the proposed transaction would not be consistent with the public interest is unsupported by other findings, the order is unsupported by essential findings of fact and should be set aside.

Brady and the Conference do not concern themselves with the other allegations of error made by appellants. Neither do they concern themselves with the ultimate issue of whether or not the order of the Commission be sustained, provided the affirmance is not (1) on the ground that the Commission *has power* to limit the services of a common carrier of property by motor vehicle authorized to operate over irregular routes to a service which is free from some, or all, the Brady case criteria; or (2) on the ground that the Commission *exercised such power* by simply using the words "over irregular routes" in a certificate, without any other words of limitation or qualification.

It may appear to the Court that the Commission's report in the instant case includes findings of fact other than the alleged prospective illegality of the proposed operation of the combined authorities, but since the lower court predicated its decision solely upon this ground, disposition of this case on motion to affirm would, if no opinion were rendered expressly reserving decision on this issue, substantially prejudice the position of Brady and the Conference in the complaint proceeding against Brady now pending before the full Commission in MC-C-246. This follows from the fact that Division 5 of the Commission, in its report in MC-C-246, relies strongly on the opinion of the lower court in the *Falwell* case as authority for its claim of power to restrict the service of carriers operating over irregular routes.

It is therefore imperative that Brady and the Conference, by demonstrating to the Court that a substantial and novel issue of law is present in this case, preserve this important issue for a decision on its merits in this or in another appropriate proceeding.

THE REPORT OF THE COMMISSION.

The Draper certificate which was first leased by Falwell pursuant to the authority granted under Section 210a(b), and then purchased by Falwell pursuant to the authority granted by Division 4 in its report of February 22, 1945 (40 M. C. C. 127), authorized, *inter alia*, operations as a common carrier of general commodities between Roanoke and Lynchburg (fixed termini) over irregular routes. The report of the entire Commission of January 14, 1946 (40 M. C. C. 439), which reversed Division 4, pitched the conclusion that the purchase had not been shown to be consistent with the public interest upon a finding that Falwell, although operating within the geographical and commodity limitations of the Draper certificate, was and would conduct operations of a different "nature" than authorized by the Draper certificate, such different operations being like those of a regular-route carrier. The Commission did not view the services of different "nature" as opposed to the public interest merely by reason of the difference; rather, it concluded that Draper had no legal right under his certificate to render the kind, quality, and quantity of service which Falwell, as lessee and purchaser, rendered between the authorized termini; that the rendition by Falwell of a frequent and substantial service, instead of a "sporadic" service, was the same kind of service as would be rendered under a certificate authorizing operations over regular routes; that the rendition of said service was and would be illegal since beyond the authority originally granted to Draper; and that because of that circumstance the purchase had not been shown to be consistent with the public interest.

This reflects an assumption by the Commission of a power and the exercise of said power which Brady and the Conference dispute.

HOLDING OF THE LOWER COURT.

The lower court stated in its opinion, at page 75, that the Commission's decision:

> "... was based on a finding which was in substance that during the period of their lease and thereafter the plaintiffs had been utilizing those rights for the conduct of regular-route operations between Lynchburg and Roanoke; that the plaintiffs intended to use the Draper rights in this manner and for this purpose and that they would not and could not be used in any other way; that if the Draper rights were unified with the already existing regular route operating rights of plaintiff out of Lynchburg, it would be impossible for plaintiffs to operate irregular-route operations between Lynchburg and Roanoke *of the nature contemplated in the original grant to Draper.*" (Emphasis supplied.)

Falwell et al. v. *United States et al.*, 69 F. Supp. 71, 75.

The Court apparently found no other reasons for the denial than the alleged illegal conversion and it adopted the Commission's view on this issue. The Court stated the issue to be whether the Commission can predicate a denial of a purchase application on the ground that irregular route operating rights cannot lawfully be used to perform a service which has the service characteristics of a regular route in character. The Court said, page 77:

> "The argument, as we understand it, amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to *the highways* (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to *schedules of service or quantity or quality of service.* And that, therefore, the holder of a certificate for irregular-route operations may, if he choose, utilize his rights or any part thereof to establish regularly scheduled operations over any highway within his territory—or in other words, to conduct his operations in

> the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificate for operations between the same points. (Emphasis supplied).

The Court stated its disagreement with this proposition, assumed the existence of an undefined "distinction between regular route and irregular-route carriers", and looked to Section 204(b) of the Act, 49 U. S. C. A. 304(b) to find the statutory authority for such a distinction and the manner in which the Commission attempts to define it. As support for its views the Court said, page 77:

> "That the Commission has authority to make the above classifications and that they are proper distinctions in classes of service which will be recognized has been well settled by the decisions of the courts. See *United States* v. *Maher*, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971.

This holding of the Court puts squarely in issue the following propositions of law: (1) Whether the Commission, in issuing grandfather certificates, had statutory authority to restrict them as to the quantity and quality of the service which could be performed by a common carrier of property by motor vehicle other than in respect of the territory to be served, the commodities to be transported, and the kind of equipment to be used where the applicant had voluntarily restricted his holding out to specialized equipment; (2) Whether the Commission had statutory authority to differentiate between types of common carriers of property by motor vehicle so as to require that such carriers "over irregular routes" must perform a different character and a smaller volume of service than carriers over "regular routes"; (3) Whether, assuming *arguendo*, that the Commission did have such authority, its use of the words "irregular routes" in the Draper certifi-

cate was intended to limit and did limit the character and quantity of the service which Draper could provide to that character and quantity which provided the basis for the confirmation of his "grandfather" rights.

The authorities cited by the Lower court do not support its proposition that the Commission did have such authority and did exercise it so as to render illegal the operation of the Draper certificate in the manner used by Falwell.

STATUTES INVOLVED.

The authority of the Commission to restrict the character and quantity of a motor carrier's service must be found in the Motor Carrier Act. (49 U. S. C. A. 300, *et seq.*) There is no express grant of such authority. The lower court was satisfied to look solely to Section 204(b) of the Act (49 U. S. C. A. 304(b)) and to two decisions of this Court, one of which refers to Section 208(a) of the Act (49 U. S. C. A. 308(a)), to find such authority.

Section 204(b) of the Act (49 U. S. C. A. 304(b)) provides:

> The Commission may *from time to time* establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, *consistent with the provisions of this part,* to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (Emphasis supplied).

It is clear from the language used in this provision that use of the authority thereby granted must be consistent with the grants of authority to the Commission and limitations upon those grants provided in the other provisions of the Motor Carrier Act. The authority of the Commission to grant, withhold or limit the operating authority of

carriers operating in interstate commerce on June 1, 1935 must be found in the certificate provisions of the Act, Sections 206(a), 207(a) and 208(a). The material provisions of Section 206 (49 U. S. C. A. 306(a)) are:

> (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * *, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, * * *.

The material provisions of Section 207(a) (49 U.S.C.A. 307(a)) are as follows:

> (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such applications shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

The material provisions of section 208(a) (49 U.S.C.A. 308(a)) which bears the title, "Terms and Conditions of Certificate" are as follows:

> (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6); *Provided, however,* That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 210, referred to, prohibits dual operation of common and contract carrier authorities except upon special findings; Section 204(a)(1) and (6) make it the duty of the Commission:

> (1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

and,

(2) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.

SUMMARY OF THE ARGUMENT.

A. There is no express or implied authority in the Motor Carrier Act (49 U.S.C.A. 300, et seq.) directing or authorizing the Interstate Commerce Commission to limit or specify the quantity or the quality of the service to be performed by motor carriers of property or by any type of motor carriers of property.

1. Section 204(b) (49 U.S.C.A. 304(b)) of the Act, authorizing the classification of carriers, does not empower the Commission, and was not intended to empower the Commission, to limit the quantity or quality of the service of motor carriers nor the exercise by them of their statutory rights and duties.

2. There is no any-where-for-hire motor carrier of property under the Act. Congress did not provide, nor intend to provide, a distinction between the business of regular-route carriers of property and the business of irregular-route carriers of property. Instead, Congress provided only two classes of for-hire property carriers, common and contract, with the same legal obligations and privileges. The distinction between the operations of regular-route and irregular-route property carriers lies only in the geographic area and pattern of the operations and the commodities to be transported, together with any self-imposed special limitations related to those commodities.

3. The authority of the Commission to consider the quality and quantity of the service of a "grandfather" applicant is limited to a determination of his status as common or contract and to the substantiality of his proof of the area served and the commodities transported. Thereafter,

the carrier's legal status, as common or contract carrier, determines the quantity and quality of the service he may perform in the territory and for the commodities authorized.

4. That part of section 208(a) (49 U.S.C.A. 308(a)) which directs the Commission to specify in the certificate the "service to be rendered" does not authorize the Commission to limit the quantity and quality of the service to be rendered.

5. The legislative history of section 208(a) (49 U.S.C.A. 308(a)) of the Act discloses that the Commission requested explicit authority to limit the service of motor carriers, that the industry opposed the granting of such a power, and that in response to this opposition, the Congress not only removed the proposed authorization from the bill but also expressly prohibited the imposition of such limitations. The Commission is here attempting to raise by implication an authority which was expressly denied it by the Congress.

B. The Commission's use of the words "over irregular routes" in the certificate issued to Draper was intended as a description of the geographic pattern of his operation and was not intended as a limitation on the quantity and quality of the service authorized. Any attempt to enlarge the meaning of those words so as to incorporate such a limitation is an attempt to revoke statutory rights contrary to the letter and the policy of the Act and to destroy property rights without due process of law.

ARGUMENT.

A. There is no express or implied authority in the Motor Carrier Act (49 U. S. C. A. 300, et seq.) directing or authorizing the Interstate Commerce Commission to limit or specify the quantity or the quality of the service to be performed by motor carriers of property or by any type of motor carriers of property.

1. Section 204(b) (49 U. S. C. A. 304(b)) of the Act, authorizing the classification of carriers, does not empower the Commission, and was not intended to empower the Commission, to limit the quantity or quality of the service of motor carriers nor the exercise by them of their statutory rights and duties.

The lower court placed principal emphasis for its upholding of the Commission's authority to limit the service of carriers using "irregular routes" on the Commission's power to classify carriers, Sec. 204(b) (49 U.S.C.A. 304(b)) of the Act, and upon the exercise of that power by the Commission in *Ex Parte No. MC-10, Classification of Motor Carriers of Property*, 2 M.C.C. 703. Reference to that decision, and to the terms and legislative history of that statutory provision, shows that they do not support this proposition. Reference to the decisions of this Court construing various of the powers and duties of the Commission under the Motor Carrier Act shows that none of them have considered or decided the issues raised herein.

In *Classification of Motor Carriers of Property, supra*, the Commission undertook to group the many different types of motor carriers into a system of defined classes. The Commission had two purposes in mind. One was to provide a convenient way of including or excluding various specialized types of carriers from the rules and regulations concerning matters such as safety, accounts, reports and hours of service. The other was to "facilitate the identification and description of the operations to be covered" in connection with the issuance of certificates (703, 704).

Beyond specifying the geographical pattern of the operations and the commodities to be carried (which in some cases necessitated consideration of the equipment to be used) the Commission did not intend nor believe it had the authority to go on classifying carriers. The report says, at page 705:

> We do not believe, however, that it is now desirable, or in accordance with the intent of section 202, to define strictly each type or kind of carrier or broker. Our basic purpose has been to ascertain and define generally the natural divisions which are now present in the industry. In so doing, we have refrained from attaching to any group rules or regulations applying to the transportation activities of the group. The necessity for rules and regulations, special or otherwise, will be brought to our attention through future experience, and will be dealt with in separate proceedings.

The Commission tacitly admitted that its power to classify carriers does not include the power to make "grandfather" carriers conform to administratively-determined grouping. The report states, at pages 703, 704:

> • • • The problem of classification is made difficult, however, by the fact that a very large proportion of the operators who are subject to the act now have "grandfather" rights. It is not always easy to fit such operators into a definite classification.

The Commission carefully avoided including in its definitions of the carrier groupings any limitations on the *character of the service* and the *quantity of the service* which carriers in any particular class or group might provide, beyond the specification of the geographical pattern of the operation. It was stated, at page 704:

> • • • We are impressed, too, with the fact that a practical classification must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome

> to the industry. The public interest requires that the way be left open for normal healthy growth. Any plan which would retard such growth would defeat the purpose of the act. We have been fully cognizant of these facts throughout the course of our study of this matter.

The report recognized that the Act provides for only three types of motor carriers, common, contract and private. It established five "Types of Property-Carrier Service": regular-route scheduled service; regular-route nonscheduled service; irregular-route radial service; irregular-route nonradial service; and local cartage service. Each type was defined geographically and none of the definitions include any limitations on the *character and quantity of the service* any of them may perform.

The Draper certificate was apparently one that the Commission had in mind when it said in the *Classification* case, *supra,* that because of the existence of "grandfather" rights, all certificates could not be fitted into the pattern established in that case. None of the five "classes of service" fit Draper's certificate. It has been said that the Draper operation is a "radial" operation. The Commission defined "irregular-route radial service" as follows, page 709:

> An irregular-route radial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such *radial area* as shall have been fixed and authorized by the Interstate Commerce Commission *in a certificate* of public convenience and necessity, *or permit,* or from any point located within such radial area to such carrier's fixed base point or points. (Emphasis supplied).

Draper has a fixed base point, Roanoke, Va., but he has no radial area. He has a series of fixed points each of which may be served on traffic moving to or from Roanoke. He operates between "fixed termini" not "within the terri-

tory", specified pursuant to section 208(a) of the Act (49 U.S.C.A. 308(a)).

It may be noted that the *Classification* case, *supra*, covers contract carriers of property as well as common carriers of property, and that the definition above-quoted refers to permits as well as to certificates. This fact negatives any interpretation which attempts to establish that these classifications were intended to define *service characteristics*. It cannot be said that this definition describes *the service* to be performed by both common carriers and contract carriers in view of the legal distinction between the two.

The legislative history of section 204(b) of the Act (49 U.S.C.A. 304(b)) establishes that it cannot be so construed as to permit its use by the Commission to limit the rights granted to "grandfather" carriers under the certificate provisions of the Act. It shows rather that it was designed as a purely administrative measure to permit the Commission to exempt from rules and regulations of general application certain special types of carriers.

This section did not appear in the Rayburn Bill (H. R. 6836), nor in the first draft of the Eastman Bill (S. 3171). It was added in the second draft (S. 1629 and H. R. 5262) by the Federal Coordinator of Transportation, Mr. Eastman, in his third report with the following explanation, at page 60, House Doc. 89, 74th Cong.:

> The provision empowering the Commission to classify common or contract carriers, respectively, into distinctive groups according to the special nature of their services, and to provide regulations for such classes or groups which are appropriate to their operations and consistent with the public interest, is of special significance in the case of motor carrier operations. This provision, coupled with others that give the Commission broad measures of administrative discretion has in view of the fact that the motor carrier industry embraces many specialized types of carriers whose operations are not conformable to a single pattern of regulation and the need in the public interest, of a form and degree of regulation sufficiently flexible

to assure the proper development of motor transportation. This provision for classification or grouping of motor carriers has a particularly important relation to the regulation of contract carriers. (House Document 89, 74th Cong., 1st Sess., Page 60).

During the Hearings Before the House Subcommittee on Interstate and Foreign Commerce on H. R. 5262, Mr. Eastman had this to say about the classification section, at pages 28, 29:

> So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern and which justifies any such regulation is the need for protecting the common carrier who undertakes to serve all the public. The common carrier is the one, it seems to me, that the Government ought, particularly to foster and protect. Now the contract carrier or private carrier can operate in such a way as to be detrimental, unfairly or improperly, to the interests of the common carrier. To the extent that such conditions exist, the Government is justified in interfering for the sake of protecting the common carrier; and it is on that principle that the regulation of the contract carrier in this bill very largely rests.
>
> In the bill, H. R. 5262, in its present form, certain changes have been made in comparison with the bill which was recommended last year, and some of these changes affect these contract carriers.
>
> Provision is made for the classification of motor carriers. This is in paragraph (b) of section 304:
>
> > The Commission may from time to time establish such just and reasonable classifications or groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

> You will note in going through the bill that there are various provisions which leave discretion to the Commission, such as the provision with respect to accounting, and other provisions of similar character. In the case of the provision with respect to the filing of rates, charges or contracts by the contract carriers, the Commission is given specific discretion to relieve carriers from those regulations if it appears that no public interest will be contravened by such relief. In other words, the idea is that these contract carriers shall be regulated only to the extent that there is a real public need for their regulation, and if it appears, in the case of any group or any class of these carriers, that such need does not exist with respect to any of these discretionary provisions, then they can be relieved from them under the terms of the bill. The authority to classify the carriers will facilitate this.

In explaining the meaning of the classification section to the members of the Senate, Senator Wheeler, Chairman of the Senate Committee of Interstate and Foreign Commerce, made the following statement, at 79 Cong. Rec. 5652:

> This paragraph is of great importance. It enables the Commission to classify carriers performing special and distinct types of service, such as the hauling of milk, livestock, furniture, petroleum products, newspapers, and so forth, and to vary the regulatory requirements as to rates, records, reports, and other matters in accordance with the nature of the service and the public need. These provisions will promote flexible administration and enable the Commission to avoid imposing unnecessary burdens. It is to the interest of carriers, shippers, and the public that this paragraph be retained.
>
> I think that is an exceedingly important paragraph, because of the fact the Commission may find, for instance, that persons who are engaged simply in hauling furniture need one kind of regulations or rules that may be prescribed. Another classification may be those who are engaged in hauling oil or gasoline and a certain type of regulations may be necessary for them. This paragraph gives to the Commission the power to handle those matters.

It is apparent, therefore, that the Commission's power to classify motor carriers does not and was not intended to empower the Commission to so classify them as to limit the quantity and character of their services.

2. There is no any where-for-hire motor carrier of property under the Act. Congress did not provide, nor intend to provide, a distinction between the business of regular-route carriers of property and the business of irregular-route carriers of property. Instead, Congress provided only two classes of for-hire property carriers, common and contract, with the same legal obligations and privileges. The distinction between the operations of regular-route and irregular-route property carriers lies only in the geographic area and pattern of the operations and the commodities to be transported, together with any self-imposed special limitations related to those commodities.

United States et al. v. *Maher*, 307 U. S. 148 (1942), relied upon by the lower court to support its holding that the Commission does have power to limit the service characteristics of carriers "over irregular routes", is not in point. That case, which involved the "grandfather" application of a passenger carrier, is distinguishable by reason of the difference in the statutory requirements for the certification of passenger carriers as distinguished from property carriers and the legal distinction between any where-for-hire passenger carriage and irregular-route property carriage.

In the *Maher case, supra*, the issue presented was whether a passenger carrier had interrupted the continuity of his operation so as to exclude himself from the "grandfather" provision of the Act where on June 1, 1935, he conducted an "anywhere-for-hire operation in Oregon with occasional trips to points in Washington" but after that date and before the determination of his "grandfather" rights he discontinued that operation and instituted a regular route standard passenger operation between Portland, Oregon, and Seattle, Washington.

This Court held that since a *new operation* was instituted after the effective date and the other had been discontinued, the applicant was entitled to no "grandfather" rights.

This involved consideration of whether he had changed the territory in which he operated, so as to destroy the continuity, and whether the any-where-for-hire bus operation, essentially a special or charter operation, constituted a different business than regular-route passenger operation —as different, for example, as the difference between common and contract carriage in the property carrier field.

This Court found that in addition to the change in territory, which might alone have sufficed to break the continuity, there is a "distinction between 'anywhere-for-hire bus operations over irregular routes and regular route bus operations between fixed termini' " which, it was held, Congress had plainly adopted. The Court's holding in the *Maher* case, *supra,* however, cannot be considered determinative of the issues of this case wherein a common carrier *of property* by motor vehicle between fixed termini is involved, in view of the distinction between the two drawn by Congress.

Section 207(a) (49 U. S. C. A. 307 (a)) recognizes a sharp differentiation between property and passenger carriers in the manner in which the Commission was to administer the certificate provisions of the Act. This section provides that the Commission shall authorize no irregular-route passenger operations other than those having the characteristics of individual contracts—that is, special or charter operations. No such policy was enunciated in the property carrier field in which a special class of "contract carriers" was established. This class has its counterpart in "special or charter" passenger carrier operations.

Reference to the legislative history of this section (49 U. S. C. A. 307 (a)) shows that Congress clearly intended to differentiate between property and passenger carriers in this respect. In his third report to the Congress, the Federal Coordinator of Transportation, Mr. Eastman, gave

this explanation for the addition of the proviso in section 207(a) (49 U. S. C. A. 307(a)) specifically prohibiting the issuance of irregular-route certificates to passenger carriers, page 62:

> In section 307 a proviso has been added to prohibit the issuance of a certificate to common carriers of passengers for operations over other than regular routes and between fixed termini, except in the case of special or charter operations. The bus industry differs from the truck industry in that there is no substantial need for operation over irregular routes. The prohibition which has been added is a necessary measure of protection for regular route operators • • •

It must be recognized that at the time of the passage of the Motor Carrier Act and thereafter, there was a marked difference between passenger and property carrier operations. The special or charter passenger operation is closely akin to the contract carrier operation in the property carrier field. Each contemplates the devotion of the exclusive use of the equipment to a single individual or small group of individuals on an individual contract basis. In 1935, the bulk of passenger operations were clearly common carrier operations, falling into a regular-route pattern. Property carrier operations, on the other hand, were diverse, ranging from private to common. Many were described as "common-contract" carriers, in that their operations included elements of both types.

The American Trucking Associations' analysis of N.R.A. Code registrations presented to Congress on behalf of the entire trucking industry during House Committee Hearings on H. R. 5262 and H. R. 6016 (74th Cong., 1st Sess.) at pages 157-183 and Senate Committee Hearings on S. 1629 (74th Cong., 1st Sess.) pages 305-338 classified for-hire carriers as (1) common carriers; (2) commodity carriers; (3) contract carriers; (4) anywhere-for-hire carriers; (5) local cartage carriers; and (6) mixed types. A typical 5-state analysis of all types showed that 80.31 percent owned only

one truck and 90.62 percent owned no more than two trucks. The number of carriers in each class and the percentage of each class owning no more than two trucks were:

Common Carriers	10,419	90.69
Commodity Carriers	547	93.54
Contract Carriers	6,530	89.38
Anywhere-for-hire Carriers	15,008	95.81
Local Cartage	7,864	92.72
Mixed Types	3,011	71.77
Total	43,379	90.62

This and other early proposals for regulation of the motor carrier industry advocated establishment of two classes of common carriers—regular-route and any-where-for-hire—in addition to contract carriers. Senate Doc. No. 43, 72d Cong., 1st Sess., page 115. After considering such proposed classifications, and the recommendations of the Commission and the Federal Coordinator of Transportation, Congress decided against sub-classifications of common carriers and provided for only two classes of for-hire carriers—common and contract. *Coordination of Motor Transportation,* 182 I. C. C. 263, 386; *Hearings Before the House Committee on H. R. 6836* (73d Cong., 2nd Sess.) p. 16; Sec. 203 (49 U. S. C. A. 303).

In the property-carrier field, the so-called any-where-for-hire and commodity carriers lost their places in the industry. They became common carriers or contract carriers. Their geographic area or points of service and their authorized commodities were specified. They were compelled to assume the full obligations, and the privileges, of common carriage, or they were forced to restrict their operations to those properly a part of contract carriage. In the passenger-carrier field, independent any-where-for-hire operations or irregular-route operations were eliminated. They became *regular route* common carriers or carriers of contract-carrier type—special or charter carriers.

So it may readily be understood that Maher's change from what amounted to a contract carrier operation to a common carrier operation constituted a change in his business which broke the continuity of his proof of "grandfather" rights. If he had obtained a certificate authorizing the charter or special operation which he was conducting before the "grandfather" date, and had thereafter begun regular route operations between two of the points named in his certificate, he would clearly have been operating unlawfully. In other words, a grandfather certificate containing the terms required by the statute to permit Maher to continue the operations conducted by him on the critical date, would not permit him legally to conduct the operations which he instituted after the critical date. This is made crystal clear by the provisions in Section 207(a) quoted above, and particularly the carefully chosen words in the proviso thereof.

In the case of a common carrier of property, no similar language governs the power of the Commission or the rights of the carrier as to the nature of the operation which may be conducted within the territorial limits of his certificate. The Draper certificate will illustrate this since he was authorized to operate as a common carrier of property generally over irregular routes between fixed termini. A carrier of passengers over irregular routes cannot have fixed termini, nor can he engage in any operation other than "special or charter operations." No such limitation is imposed by the statute on common carriers of property over irregular routes. Such common carriers of property are treated by the statute as having the same legal character and the same rights as to quality, quantity, and characteristics of the service as any other common carrier of property. Once the property carrier's legal status, common or contract, was determined, and his territory or fixed-termini and his commodities, were fixed, he had all the rights and duties of any common carrier including the duty to serve the public indiscriminately and to the full extent of his facilities as required.

In analogy to the *Maher* case, *supra,* the situation before this Court is this. Should Draper have changed his service between Lynchburg and Roanoke sometime after June 1, 1935, and before his rights were determined, to the character of service which Falwell provided over those rights—that is, a nonscheduled but frequent service over the same highway, of volume traffic, handled on interchange, moving to and from points beyond his termini—would he have so changed his operation as to destroy its continuity and lose his "grandfather" rights? We submit, that such would not be the case. He would have been handling the same commodities between the same points—he would simply have been providing more service of the kind which he held himself out to perform.

This view of the law has been expressly recognized by the Commission in granting certificates to common carriers of property *between fixed termini* over irregular routes. See *Southern United Lines, Inc.* case, 42 M.C.C. 251, reversing 24 M.C.C. 241. That case involved, as to a carrier of property, almost identically the same situation as was involved in the *Maher* case, as to a carrier of passengers. In its first report, Division 5 denied the certificate on the ground that the applicants after the critical date changed from an irregular-route territorial service to a service performed as an ordinary common carrier over a regular route between fixed termini. In the second report, Division 5 granted the certificate on the ground that the operations between the fixed termini were *within the territory served* on the critical date, and, therefore, met the requirements of Section 206(a) as to a carrier of property. Implicit in this holding is the recognition that the operations and "businesses" of regular-route and irregular-route property carriers are the same.

3. The authority of the Commission to consider the quality and quantity of the service of a "grandfather" applicant is limited to a determination of his status as common or contract and to the substantiality of his proof of the area

served and the commodities transported. Thereafter, the carrier's legal status, as common or contract carrier, determines the quantity and quality of the service he may perform in the territory and for the commodities authorized.

In *N. S. Craig, Contract Carrier Application*, 31 M. C. C. 705 (1941) the Commission, in its leading case on the distinction between common and contract carriage, had this to say, pp. 707, 708:

> It was pointed out that while the statute clearly contemplated that all for-hire motor carriers should be divided into only two classes, the line of demarcation between the two was indistinct, and that the two classes graded into each other so gradually as to make the proper classification of some particular carriers very difficult. At one extreme there was visualized those carriers serving all shippers indiscriminately under substantially identical arrangements, and, at the other, those who under individual contracts rendered only a specialized service meeting the peculiar needs of a particular shipper. The classification of the constituents of these extreme groups, of course, was no problem. The former were clearly common carriers and the latter contract carriers. In between these two extremes, however, the division recognized a confused assemblage of carriers, each of whom, to a greater or lesser degree, possessed some attributes of each of the extremes, and concluded that since the act, with exceptions not here important, contemplates the regulation of all for-hire motor carriers as either common or contract carriers, each such carrier of uncertain status must be classified according to the extreme which it most closely resembles. * * * With these conclusions we agree. * * * The courts have recognized contract carriage as a form of private carriage. * * * Both in its original conception and consistently since, the essential attribute distinguishing common carriage from private (contract) carriage has been the presence, or lack, of an offer or holding-out to serve the public generally. * * *

The Commission points out, page 709, that in determining whether a given carrier's holding out was that of a

common or contract carrier, "weight has been given to such secondary considerations as the number of contracts held, the frequency of their change, the commodities transported, the character of the physical operations performed, the use or not of regular routes, the giving or not of scheduled service, the observance or not of uniform charges;". The tests used to distinguish between common and contract (private) carriers appear strikingly similar to those used by Division 5 in the *Brady* case, *supra*, to force a distinction between regular-route and irregular-route common carriers.

It is conceded that the Commission, in a "grandfather" case, could properly examine the service characteristics of the applicant's operations in order to determine, first, whether the operations he conducted with such substantiality as to constitute bona fide holding out constituted him a common carrier or a contract carrier; and, second, what geographic and commodity authority were measured out by such substantially proved bona fide holding out. But once the character of the operation, common or contract, was established, and the determination made as to his bona fide holding out in terms of the territory to be served and the commodities transported, consideration of these service characteristics was at an end. This necessarily follows from the fact that the Commission's function, in considering the evidence of his operation, was to determine the extent of his bona fide holding out. Once that determination has been made, the carrier's holding out—as common or contract—determined both the obligations and the privileges which are attached to those classes of carriers.

4. That part of section 208(a) of the Act (49 U. S. C. A. 308(a)) which directs the Commission to specify in the certificate the "service to be rendered" does not authorize the Commission to limit the quantity and quality of the service to be rendered.

Any authority which the Commission may have to specify service features, such as the *Brady* case criteria, must be

found in that part of section 208(a) of the Act (49 U. S. C. A. 308(a)) which directs the Commission to specify in certificates "the service to be rendered." It was early recognized that the word "service" referred to the geographical pattern, such as radial or non-radial, the commodities to be carried and those excluded, and the character of the equipment to be used where the applicant had restricted his holding-out to specialized equipment.

The relation of the commodities to the equipment used make both necessary ingredients of the definition of the service to be rendered. Thus, in *Crescent Express Lines* v. *U. S.*, 320 U. S. 401 (1943), this Court held that the use of small vehicles to transport passengers constitutes a different business, because of the nature of that service, than the business of standard passenger lines. In the passenger carrier field, in which but one "commodity" is transported, the nature of the travel involved provides the distinction which is provided in the property carrier field by distinctions in commodity authorizations.

In *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, the issue was presented whether the Commission could require a stricter test of proof of commodities transported and points served for irregular route than for regular route carriers. The Court stated, at page 483:

> By sect. 208(a) the certificate must specify "the service to be rendered" by the carrier. As we have noted, a "common carrier by motor vehicle" was defined in sect. 203(a) (14) as one who "undertakes" to transport "passengers or property, or any class or classes of property, for the general public". That definition is the same for irregular and regular route carriers.

At page 485, the Court said:

> • • • The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular- route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common

> carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier. • • •

Again, at page 486, it was stated:

> • • • For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation.

In *Crescent Express Lines, Inc.* v. *United States, et al., supra,* this court cited with approval a decision of the Commission in which the Commission admitted its lack of authority to limit the service of motor carriers. *Irving Nudelman Common Carrier Application,* 28 M. C. C. 91, 95, 96; citing *Pittsburgh-Weirton Bus. Co. Inc. Com. Car. Application,* 10 M. C. C. 266. In the latter case, the issue was whether a carrier had instituted a *new operation* by increasing its service between two points from one round-trip a day to 250 one-way trips a day. The Commission held it had not instituted a new operation and referred to the proviso of Section 208(a) (49 U. S. C. A. 308(a)), saying at page 270:

> This prohibition protects the right of the carrier to expand not only its "equipment" but also its "facilities". The only purpose of such expansion is to enable the carrier to provide more service, and this is very clearly indicated by the words "as the development of the business and the demands of the public shall require." It follows that "terms, conditions, or limitations" in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso.

5. The legislative history of section 208(a) (49 U. S. C. A. 308(a)) of the Act discloses that the Commission requested explicit authority to limit the service of motor carriers, that the industry opposed the granting of such a power, and that in response to this opposition, Congress not only

removed the proposed authorization from the bill but also expressly prohibited the imposition of such limitations. The Commission is here attempting to raise by implication an authorty which was expressly denied it by the Congress.

The legislative history of section 208, viewed in light of the legislative history of the Motor Carrier Act as a whole and particularly of the certificate sections of the Act, establishes that the power given the Commission to specify the service to be rendered was not to be construed as authority to limit the incidents of service as the Commission has attempted to limit them in the *Brady* case, *supra*, and the *Falwell* case, *supra*.

Section 208(a) of the Act appeared in four different forms in the course of its legislative history. It was present in the Rayburn Bill (H. R. 6836), in the first draft of the Eastman Bill (S. 3171), in the second draft of the Eastman Bill (S. 1629 and H. R. 5262), and in the Motor Carrier Act. The section underwent considerable change following the public hearings on these bills. These changes, and the expressed reasons for them, clearly show that the section was intended to provide no authority for reducing in any way the rights guaranteed by section 206(a) and the sections of the Act declaratory of the common law concept of common carriage.

In the Rayburn Bill, the Commission was authorized to attach to the exercise of the privileges granted:

> "* * * such reasonable terms and conditions as the public convenience and necessity may from time to time require, including terms and conditions as to the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory * * *."

There was no proviso. It will be noted that while the Commission, under this provision, could specify "terms, and conditions", the word "limitations" was omitted. It will be noted further, that this draft would have given the Com-

mission explicit authority to *regulate the furnishing of additional service* but not expressly to *limit* it.

The first draft of the Eastman Bill did not change the language of this section in any important particular. No action was taken on this bill and the following year the second draft was submitted as S. 1629 and H. R. 5262 in the third report of the Federal Coordinator (House Document No. 89; 74th Cong., 1st Sess.). In it, section 208(a) was made applicable to certificates issued under section 206(a), the "grandfather" section, as well as to section 207, and one additional important change was made.

It is provided that the Commission was authorized to attach to the exercise of the privileges granted:

> "* * * such reasonable terms, conditions, *and limitations* as the public convenience and necessity may from time to time require, including terms, conditions *and limitations* as to the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory * * *".

The addition of the words "and limitations", added by the Coordinator, was plainly designed to extend the Commission's jurisdiction to the point at which it could *limit the furnishing of additional service.*

Extensive hearings were held before both houses of Congress on this bill, and section 208(a) was the target of considerable criticism by members of the industry who were afraid to trust to an administrative agency the control of the growth of their businesses, through its power to limit any additional service which they might offer. There are many pages of such testimony in the records of the hearings. As a result this section was amended by the Senate Committee in important particulars. The Commission's authority to impose terms, conditions or limitations as to *"the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory"* was eliminated. To make doubly sure that the Congressional mandate should not be misunderstood,

the proviso to the section was added prohibiting limitations as to the furnishing of additional "equipment and facilities". The proviso protects both regular route and irregular route carriers.

This should make it perfectly clear that the Commission was to have no power to limit or restrict the service which a carrier might offer. It shows further that the words "equipment and facilities" were used with the same intent and meaning as "additional service."

The explanation of these changes on the floor of the Senate, made by Senator Wheeler, confirms this analysis (79 Cong. Rec. 5654). He said:

> Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) by striking out lines 14 to 16, page 26, and by adding a proviso which permits operators to add to their equipment and facilities as business conditions may require, provided they do not go beyond the route or routes or outside the territory specified in their certificate. There was objection to the provision as it came in by a great many, so the committee amended it to meet the objection.

Since the Commission had no authority to limit the quantity of the service which a carrier may perform "over irregular routes" when it issued him his certificate, it has no such power now. *United States et al.* v. *Seatrain Lines, Inc.*, 67 S. Ct. 435, 438. The use of terminals, solicitors, schedules, and the other service features which make up the character of the service offered, all relate directly to the production of additional volume through the furnishing of additional facilities. The Commission has no power to limit the furnishing of any of them. The authority was requested of Congress but was expressly refused.

Neither the Commission nor the lower court in the instant case, nor Division 5 in the Brady case, gave heed to the legislative history hereinabove discussed, nor do the reports or decisions suggest any appreciation of the significance of that history in construing the governing statutory provisions.

In *U. S. et al.* v. *Seatrain Lines, Inc.*, 67 S. Ct. 435, was involved the power of the Commission to fix terms in a grandfather certificate granted to a common carrier by water. In issuing the certificate, the Commission limited it to operations only "as a common carrier by the 'Seatrain' type of vessel, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, Louisiana, and Texas City, Texas." This court held that the limitation imposed was beyond the authority of the Commission. In so holding, this court drew a distinction between the Water Carrier Act and the Motor Carrier Act upon two grounds which might appear upon superficial examination to have a bearing upon the instant case:

(1) Section 208(a) of the Motor Carrier Act authorizes the Commission in issuing a certificate to motor carriers "to specify the service to be rendered"; Section 309(d) (49 U. S. C. A. 909(d)) of the Water Carrier Act grants no such authority upon the issuance of water carrier certificates.

(2) The proviso in Section 208(a) in the Motor Carrier Act withholds power from the Commission to restrict "the right of the carrier to add to his or its equipment and facilities *over the routes between the termini, or within the territory specified in the certificate,* as the development of the business and the demands of the public shall require." The proviso in Section 309(d) of the Water Carrier Act

uses in part the same phraseology but substitutes for the italicized words the following: "or service within the scope of such certificate."

By reason of these differences, this Court held that its decisions relating to the Commission's power in issuing a motor carrier certificate were not controlling. This does not, however, infer that this Court has directly or indirectly sustained the power of the Commission to specify the quantity or frequency of the service which may be rendered by a certificated motor carrier. The motor carrier cases cited in footnote 5 in the *Seatrain* case related entirely to other matters. In *Chicago, St. P. & M. N. O. R. Co.* v. *U. S.*, 322 U. S. 1, the requirement that a common carrier of property by motor vehicle serve intermediate points was sustained. In *Noble* v. *U. S.* 318 U. S. 88, a restriction in a permit issued a contract carrier by motor vehicle to service for persons who operate food canneries or meat packing business, was sustained. These restrictions are wholly foreign to the quantity or frequency of the service rendered. They illustrate what is not disputed: In granting certificates to motor carriers, the Commission does have power to distinguish between common and contract carriers in specifying the service to be rendered; and in specifying the service to be rendered by common carriers, to prescribe the routes, points or area, the geographic pattern of operation, the commodities to be carried and special provisions related to those commodities, such as the type of equipment to be used and the minimum weights for individual shipments. They do not suggest the existence of an unlimited power to limit the quantity and quality of the service of a common carrier of property within the scope of such specification. They do not suggest the existence of a power to modify such a carrier's obligation to carry for all to the limit of his facilities without discrimination.

The foregoing analysis of the legislative history of the Motor Carrier Act shows that the language of the original section was changed and the proviso added for the express

purpose of preventing Commission-imposed limitations *on the service* of motor carriers, without distinction as to regular or irregular route authorities. Certainly the right to add equipment and facilities is an empty right if the Commission may prevent their gainful employment. The changes in the Water Carrier Act may be considered as insurance features requested by the industry and designed to prevent just such action as the Commission is here attempting to take—the establishment of an administrative power through statutory interpretation which was requested by the Commission of the Congress and expressly denied it by Congress.

B. The Commission's use of the words "over irregular routes" in the certificate issued to Draper was intended as a description of the geographic pattern of his operation and was not intended as a limitation on the quantity and quality of the service authorized. Any attempt to enlarge the meaning of those words so as to incorporate such a limitation is an attempt to revoke statutory rights contrary to the letter and the policy of the Act and to destroy property rights without due process of law.

It is apparent that the Commision, in the *Falwell* and *Brady* cases, *supra,* is attempting to substitute its own beliefs for the expressed intention of the Congress. Congress recognized a need to limit the activities of any-where-for-hire property carriers by limiting them to the areas and commodities which they could prove they had served substantially and by classifying them either as common or contract carriers with the corresponding duties and limitations of whichever class applied. It specifically recognized that the needs of the public and the industry require that each carrier be left free to grow and enlarge its business within the scope of the territory and commodities authorized.

The Commission here attempts to serve the interests of regular-route common carriers at the expense of irregular-

route carriers by limiting their use of the facilities and methods of operation necessary for such growth. By so doing, the Commission is attempting what amounts to revocation of certificated rights without due process of law and in a manner contrary to the express mandate of the Congress. It is clearly futile for the Commission to say that its use of the words "over irregular routes" in certificates issued by it was intended to be a specification of the quality and the quantity of the service authorized in view of its lack of authority so to do. Even if it be assumed that the Commission had had such authority, the wide range of differentiation among irregular-route carriers in the service features and volumes of traffic shown in their "grandfather" evidence shows that the words "irregular routes" could not have been intended to define these characteristics or even indicate a general limitation on the quantity and quality of the service authorized, but rather were used to designate the geographic pattern of the operation.

If it be assumed, *arguendo,* that the Commission did have authority to specify and so limit the quantity and quality of the service to be performed, reference to its decisions shows that it did not use the phrase "over irregular routes" to so limit the service characteristics of carriers whose certificates contain this description. In the *Clemmetson Extension* case, 10 M.C.C. 739, the applicant held authority to transport specified commodities between fixed termini over irregular routes. He applied for regular route authority on the assumption that such authority was required because he always used the same highways in operating between the fixed termini. The Commission denied the application upon the ground that (page 740) "No further authorization is required with respect to these operations, • • •."

In the *J. Miller Co.* case, 42 M.C.C. 709, 712, the Commission said:

> In considering applications for authority to operate over regular routes, we have never required an appli-

cant to establish that it conducted a regular or scheduled service.

See also: *Dougherty Storage & Van Co.* case, 3 M.C.C. 427, 430; *Waltz Transptn., Inc.* case, 10 M.C.C. 30, 32.

In the *Gordons Transports, Inc.*, case, 29 M.C.C. 413, 414-415, the Commission said in substance that regular service and irregular service were not synonymous with regular routes and irregular routes, respectively, and that the term "regular routes" meant no more than operations conducted over certain designated highways. In the *Motor Cargo, Inc.*, case, 34 M.C.C. 519, 527-528, the Commission said in substance that a difference in the frequency of the operations as between the various parts thereof did not require the grant of regular-route authority for the frequent part and irregular-route authority for the less-frequent part.

In *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, 719, the Commission said:

> And, it has been held generally in motor-carrier proceedings under sections 5 and 212 (b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities, are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. *The only requirement in these instances* has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. (Emphasis supplied.)

In both the *Falwell* case, *supra*, and the *Brady* case, *supra*, the Commission found it necessary to examine the *evidence* upon which the irregular-route certificate had been granted in order to find what quantity and quality of service it now maintains that it authorized in the "grandfather" grant. It is apparent that the Commission, if permitted the exercise of this claimed authority, would limit the

quantity and quality of the service of irregular-route carriers to that which they were performing on June 1, 1935, denying them the right to growth and denying the public the greatest quantity and finest quality of service which these carriers would otherwise be able to provide. No other agency of transportation is so limited and so restricted; the Congress did not intend that this important and substantial part of the motor carrier industry should be so limited and restricted.

CONCLUSION.

The foregoing discussion demonstrates that there is implicit in the decision by the Commission and by the lower court in this case a substantial question of law never before presented to this Court for determination.

On this issue, Brady and the Conference take the position that the Interstate Commerce Act provides the Commission with no authority to specify the quantity or quality of the service which may be performed pursuant to a certificate issued under section 206(a) (49 U. S. C. A. 306(a)) of the Act; that the Act provides no authority to differentiate between carriers operating over regular-routes and those operating over irregular-routes between the same points as to the quantity and quality of the service to be rendered; that the Commission, in issuing Draper's certificate authorizing operations "over irregular-routes" did not so specify the quantity or the quality of the service which he might render; and that by his certificate Draper is authorized to perform whatever quantity and quality of service his facilities and the needs of the public will permit. Therefore, the proposed use of those rights by Falwell would not be illegal.

If the conclusion by the Commission that the proposed transaction, subject to the provisions of section 5 (49 U. S. C. A. 5) of the Act, was not consistent with the public interest rests solely upon the finding of fact that consummation of the transaction would result in the exercise by

Falwell of the Draper authority in an unauthorized and therefore illegal manner, this conclusion is not supported by a finding of fact since that finding is founded on an error of law. If this Court finds that it must determine the validity of the Commission's order through consideration of the validity of the Commission's finding of prospective illegality of the operation, then the issue presented deserves consideration by this Court on its merits. On the other hand, if there can be found in the report other reasons or findings which support the Commission's conclusion, and the Court finds it unnecessary to decide the issue of illegality of the operation, discussed herein, so that that issue may be left for determination in a more appropriate proceeding, the Court is respectfully requested to expressly reserve consideration of that issue.

This brief in reply to the motion of appellees to affirm the decree of the lower court is presented in order to aid the Court in determining that a substantial and novel issue of law is involved. The nature of the issue has been explored more fully than might otherwise have been the case because, while this Court has in the *Maher* case, *supra,* and the *Seatrain* case, *supra,* been presented with issues somewhat similar to that discussed herein, any resemblance between them is superficial and disappears under close scrutiny. It has therefore been thought necessary to discuss these cases and the underlying authorities in some detail. It is to be hoped that this analysis will be helpful to the Court in passing on the motion to affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of this brief has been served upon each party indicated below by mailing a copy thereof, postage prepaid, to each.

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